

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 18, 2009 Session

ELLIOTT KERSHAW v. POLLY SPANN KERSHAW

**Appeal from the Circuit Court for Davidson County
No. 02D-291 Carol Soloman, Judge**

No. M2009-00151-COA-R3-CV - Filed November 20, 2009

Father, the primary residential parent, seeks to suspend Mother's parenting time for failure to adhere to the terms of the parenting plan. The trial court suspended Mother's time with the children, fired Mother's treatment counselor, and awarded Father attorney's fees. Mother appealed. We reverse the trial court's suspension of Mother's parental time. We also find that Mother waived her right to challenge the trial judge's impartiality and that the issue of the firing of the counselor is moot. Neither party is entitled to attorney's fees.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed

ANDY D. BENNETT, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR. and RICHARD H. DINKINS, JJ., joined.

Connie Reguli, Brentwood, Tennessee, for the appellant, Polly Spann Kershaw.

Helen Sfikas Rogers and Lawrence James Kamm, Nashville, Tennessee, for the appellee, Elliott Kershaw.

OPINION

Background

Elliott Kershaw ("Father") and Polly Spann Kershaw ("Mother") were divorced in November 2007. Their agreed parenting plan named Father as the primary residential parent. The parenting plan dealt extensively with Mother's parenting time:

Mother shall currently have supervised residential time with the minor children from 10:00 a.m. to 1:00 p.m. through the Exchange Club, however, [Mother's] residential time shall be expanded to:

First 30 days: visits at the Exchange Club Only 10:00 am to 1 pm at Mother's cost.

Next 30 days: Point of Exchange for Children at the Exchange Club Only with Mother to have supervised visits from 10 am on Saturday until 6 pm every Saturday at Mother's cost, with supervision permitted by Mother's friend(s) or an individual, said friend or individual to be agreed upon by the parties.

At 60 days: Every other weekend from Friday at 6 pm to Sunday at 6 pm and every Wednesday night from school or 5 pm to 9 pm.

The above residential time is contingent upon the following occurring:

(a) (1) Mother shall be in an active recovery program as supervised in the sole discretion of Michael Murphy for as long as Michael Murphy recommends and under the terms recommended by Michael Murphy;

(2) Father shall be permitted at all times during said program to obtain a confirmation that the out-patient treatment program is being or has been successfully completed;

(3) Mother maintains full-time employment within 20 days of this agreement and remains employed full-time (at least 36 hours a week); provided that if Mother loses her job or becomes unemployed for any reason, she shall become re-employed within 30 days on full-time basis. Under no circumstance shall Mother lose her job or become unemployed more than three times per year.

(4) Mother shall also attend at least 20 counseling sessions with Michael Murphy and 20 sessions per year.

(5) Mother shall make a commitment to abstain totally from gambling in the future;

(6) Mother shall have Michael Murphy, who is familiar with the problems of compulsive gambling, help Mother deal with whatever is necessary to help her with said problem and Michael Murphy shall be permitted and required to report any non-compliance by Ms. Kershaw with the requirements of this plan to each counsel for Mr. and Ms. Kershaw. Mother consents to this disclosure of any non-compliance as necessary supervision of her recovery.

(7) Mother shall attend Gamblers Anonymous meetings one time a week for as long as is required by said therapist or counselor.

(8) Mother shall insure that she has a Gamblers Anonymous sponsor with whom to talk for as long as required by said therapist or counselor.

(b) (1) Mother shall also attend at least 20 counseling sessions with Michael Murphy each year and attend Gamblers Anonymous for as long as required by Michael Murphy.

In the event that Mother does not comply with any of the foregoing terms, Father shall have the right by motion to ask the Court immediately to suspend her residential parenting time with the children and if the Court finds that Mother has intentionally violated this agreement by not complying with any of the foregoing terms, her residential parenting time shall be suspended immediately and she shall pay Father's attorney's fees and costs for prosecuting such motion. In said event Mother's residential parenting time shall remain suspended until she can by petition show a substantial and material change in her circumstances that full compliance with the above requirements has been reinstated.

In June 2008, pursuant to the agreement, Father filed a motion to suspend Mother's residential parenting time. He alleged that Mother had vandalized his car, cashed his checks without authorization, resumed gambling, failed to attend Gambler's Anonymous and other required counseling sessions, and failed to hold a full-time job. He also claimed that Ms. Michael Murphy, Mother's counselor, had not obeyed the court's order by furnishing Father with reports of Mother's compliance with her recovery program and, therefore, should be replaced with a new counselor.

After a hearing on June 27, 2008, the trial court allowed Mother's attorney to withdraw and granted Mother additional time to seek legal counsel. In addition, the trial court suspended Mother's parenting time until the motion could be heard and ordered Ms. Murphy to cooperate in providing information to Father's counsel in accordance with the subpoena and the parties' parenting plan.

The hearing was set for August 8, 2008, but was continued to September 12, 2008, at Mother's request. The September hearing was filled with contradictory testimony and peppered with comments from the judge. Father believed Mother vandalized his car, but he had no proof and she had no access to his garage. Mother did not attend Gamblers Anonymous and had no sponsor, but Ms. Murphy testified that she did not require Mother to attend or have a sponsor, as Ms. Murphy was permitted to do by the agreement, because the Gamblers Anonymous program was not appropriate for Mother's needs. Mother did not hold a full-time job because no hospital would guarantee her the time she needed for visitation with her children. Instead, she worked for nursing temp agencies. Father maintained that Mother forged several blank checks on his account and testified that the blank checks were sent to his former address, the marital home, which Mother occupied. Mother claimed that Father gave her the checks and authorized her to sign his name. Father inferred that Mother continued to gamble because two of the checks were cashed in Memphis, which is near the casinos in Tunica, Mississippi. Father's suspicions were not, however, supported by proof. Mother did admit to spending \$20 for a bingo card in South Carolina, but she and Ms. Murphy considered that

more of a recreational activity. Mother also admitted to cashing a couple of checks on Father's closed account. As to whether Ms. Murphy followed the requirements of the court-approved parenting agreement, each side pointed to provisions in the agreement supporting their contentions. The trial court announced that Ms. Murphy was "fired" before any proof was heard.

The trial court promised to rule soon, but no order was entered regarding the September hearing.¹ Consequently, Mother's parenting time remained suspended, awaiting an order. Mother eventually filed a motion for holiday visitation. The trial court granted supervised visitation but required Mother, who was now employed at Williamson County Medical Center, to undergo treatment from a psychologist or psychiatrist before the court would lift the suspension of her parenting time. Mother appealed.

STANDARD OF REVIEW

The trial court's findings of fact are reviewed de novo on the record, with a presumption of correctness unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d). Conclusions of law are reviewed de novo with no presumption of correctness. *Frye v. Blue Ridge Neuroscience Ctr, P.C.*, 70 S.W.3d 710, 712 (Tenn. 2002).

¹ Apparently there was some confusion caused by a fire alarm test at the end of the September 12, 2008 hearing. According to her comments at the December 19, 2008 hearing, the judge did not have any notations in the file about taking anything under advisement. Further confusion is evident from the judge's dialogue with the attorneys at the December hearing:

Father's attorney: I'm going to submit a fee affidavit. I just want you to see it and consider it as you want. Then you'll enter an order from the last time?

The Court: Yes, now that I know I have to do that.

* * * *

The Court: What am I entering an order on?

Father's attorney: It was a motion to suspend visitation. I think you granted it.

The Court: I granted it.

Mother's attorney: You took it under advisement.

The Court: Yeah. I granted it.

Father's attorney: What happened was, when I filed the motion, you entered a restraining order and suspended it.

The Court: I'm not going to lift it until I'm satisfied.

ANALYSIS

Suspension of Parenting Time

Tenn. Code Ann. § 36-6-301 governs visitation and states, in pertinent part, that:

After making an award of custody, the court shall, upon request of the non-custodial parent, grant such rights of visitation as will enable the child and the non-custodial parent to maintain a parent-child relationship unless the court finds, after a hearing, that visitation is likely to endanger the child's physical or emotional health.²

This statute, enacted in 1995, is consistent with the pre-existing judicial policy that visitation may be limited or eliminated altogether if it “would jeopardize the child, in either a physical or moral sense.” *Suttles v. Suttles*, 748 S.W.2d 427, 429 (Tenn. 1988) (quoting *Weaver v. Weaver*, 261 S.W.2d 145, 148 (Tenn. Ct. App. 1953)). The *Weaver* standard continues to be quoted and followed even after the passage of Tenn. Code Ann. § 36-6-301. See *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001); *Hogue v. Hogue*, 147 S.W.3d 245, 251 (Tenn. Ct. App. 2004). Thus, it is the public policy³ of the State of Tennessee that courts shall grant parenting time with the non-custodial parent unless visitation will harm the child.

The parties’ parenting plan provided that:

In the event that Mother does not comply with any of the foregoing terms, Father shall have the right by motion to ask the Court immediately to suspend her residential parenting time with the children and if the Court finds that Mother has intentionally violated this agreement by not complying with any of the foregoing terms, her residential parenting time shall be suspended immediately

The parenting plan sets a standard for suspension of parenting time that is inconsistent with Tenn. Code Ann. § 36-6-301. The parenting plan merely provides for a determination that Mother had intentionally violated the plan in order for her parenting time to be suspended. It establishes no requirement that harm to the children must be shown and the trial court imposed no such requirement. Father argues that:

²Since the passage of Tenn. Code Ann. § 36-6-301, the term “visitation” has been largely replaced with “residential parenting time.”

³“The public policy of the state is to be found in its constitution, statutes, judicial decisions and applicable rules of the common law.” *State ex rel. Swann v. Pack*, 527 S.W.2d 99, 112 n.17 (Tenn. 1975), *cert. denied*, 424 U.S. 954 (1976) (citing *Home Beneficial Ass'n. v. White*, 177 S.W.2d 545 (Tenn.1944)); see also *Purkey v. Am. Home Assurance Co.*, 173 S.W.3d 703, 705 (Tenn. 2005).

the terms of that Plan reflect Ms. Kershaw's tacit agreement that any failure on her part to comply with those terms would be likely to endanger the physical and emotional health of the children . . . and they reflect Mother's recognition of the fact that she had previously engaged in multiple episodes of behavior which had endangered the children. The Trial Court has seen years of such behavior

Tennessee case law requires more than assumptions to deny a parent time with her children. A non-custodial parent's visitation "may be limited, or eliminated, if there is definite evidence that to permit ... the right would jeopardize the child, in either a physical or moral sense." *Eldridge*, 42 S.W.3d at 85 (quoting *Suttles*, 748 S.W.2d at 429). The trial court made no findings⁴ that the actions of Mother in any way jeopardized the children. Indeed, there is no order in the record at all.

While the parenting plan is part of the contract between the parties, a contract provision that conflicts with statutory law is void as against public policy. *Spiegel v. Thomas, Mann & Smith, P.C.*, 811 S.W.2d 528, 529-30 (Tenn.1991). The parenting plan attempts to change the statutory rule for determining whether parenting time should be suspended. As the saying goes, the law is the law. This provision of the parenting plan conflicts with Tenn. Code Ann. § 36-6-301 and is, therefore, unenforceable. Since there is no order for the September 12, 2008 hearing, there is no finding that Mother jeopardized the children, and there is no legal basis for suspending Mother's parenting time. The order of July 7, 2008, temporarily suspending Mother's parenting time is vacated. The order of December 19, 2008, continuing the suspension, also contains no findings that Mother's parenting time jeopardized the children and is likewise vacated.

Bias

Every litigant is entitled to an impartial court. *Caudill v. Foley*, 21 S.W.3d 203, 214 (Tenn. Ct. App. 1999). "In general, a judge should recuse himself or herself if there is any doubt regarding the judge's ability to preside impartially or if the judge's impartiality can reasonably be questioned." *Id.* "[R]ecusal is also warranted when a person of ordinary prudence in the judge's position, knowing all of the facts known to the judge, would find a reasonable basis for questioning the judge's impartiality." *Alley v. State*, 882 S.W.2d 810, 820 (Tenn. Crim. App. 1994).

No motion to recuse was filed in this case until four and one-half months after the appeal was taken.⁵ After the facts supporting a motion to recuse are known, the party seeking recusal must file the motion promptly. *Davis v. Tenn. Dep't of Employment Sec.*, 23 S.W.3d 304, 313 (Tenn. Ct. App. 1999). Failure to file a motion to recuse in a timely manner waives the party's right to challenge the

⁴The trial court made many off-the-cuff statements that were not characterized as findings and, in the context in which they were made, do not rise to the level of findings.

⁵Mother's brief, filed May 12, 2009, states that "no Motion to Recuse has been filed." Father's brief, filed June 30, 2009, notes that on June 1, 2009, Mother filed a motion to recuse the court and disqualify counsel in the trial court. The record does not contain an order either granting or denying the motion to recuse.

judge's impartiality. *Id.* For purposes of this appeal, Mother has waived the right to raise the issue of the impartiality of the trial judge. The issue remains with the trial judge.

Although Mother has waived her right to attack the trial court's impartiality, we believe a couple of additional observations are appropriate. "Bias or prejudice in the disqualifying sense must stem from an extrajudicial source and not from what the judge hears or sees during the trial." *Wilson v. Wilson*, 987 S.W.2d 555, 562 (Tenn. Ct. App. 1998). The trial judge has been dealing with this case since it was filed in February 2002. Her comments, intemperate, inappropriate and generally unnecessary, obviously arose from her impressions of Mother formed during the course of the proceedings. "Most trial judges, we suspect, have strong feelings about certain types of behavior or conduct. When the judge perceives that one party or the other has engaged in that conduct, the party should not be surprised that he/she has incurred the judge's wrath." *Id.* We make these observations not to excuse the trial judge's comments but in an attempt to explain them. In the context of the entire matter, we do not believe the judge's comments quite rise to a level requiring her removal from the case. We would, however, counsel the trial judge to be more mindful of her comments in future proceedings.

Firing the Counselor

At the September 12, 2008 hearing, the trial court fired the counselor named in the parenting plan to treat Mother and to report to the attorneys if Mother failed to adhere to the requirements of the plan. The trial court's firing of the counselor did not prevent Mother from continuing to attend sessions with the counselor. Firing the counselor was the court's way of indicating it would not use the counselor as an agent of the court in determining Mother's compliance in the future.

We need not determine whether the trial court's firing of the counselor was appropriate because the issue is moot. An issue will be considered moot if it no longer serves as a means to provide some sort of judicial relief to the prevailing party. *Alliance for Native Am. Indian Rights in Tenn., Inc. v. Nicely*, 182 S.W.3d 333, 338 (Tenn. Ct. App. 2005); *Knott v. Stewart County*, 207 S.W.2d 337, 338-39 (Tenn. 1948). Determining whether a case or an issue has become moot is a question of law, reviewed de novo with no presumption of correctness. *Nicely*, 182 S.W.3d at 338-39.

The issue of the trial court firing the counselor is moot because Mother does not see the counselor any more because of a lack of insurance, not because of the court's order:

The court: Is she still going to that therapist?

Mother's attorney: No, Your Honor, she's not. Unfortunately, Your Honor, her insurance lapsed. And Your Honor wasn't pleased with that therapist anyway.

Therefore, we find the issue of the firing of the counselor moot. Additionally, Mother's attorney arguably waived the issue of the firing.

Award of Father's Attorney's Fees

Paragraph 20 of the parenting plan states:

In the event it becomes reasonably necessary for either party to institute or defend legal proceedings relating to the enforcement of any provision of this Agreement, the prevailing party shall also be entitled to a judgment for reasonable expenses, including attorney's fees, incurred in connection with such proceedings.

Father instituted the proceedings to enforce the agreement; Mother defended. As we have already found, the plan conflicts with Tenn. Code Ann. § 36-6-301 and is, therefore, unenforceable with respect to the suspension of visitation. Since each party consented to the use of an improper standard, each is responsible for the series of enforcement hearings and each should bear his or her own costs, including attorney's fees.

Conclusion

The trial court's suspension of Mother's parental time is reversed. Mother waived her right to challenge the trial judge's impartiality, and the issue of the firing of the counselor is moot. Neither party is entitled to attorney's fees. Costs of appeal are assessed against Father, for which execution may issue if necessary.

ANDY D. BENNETT, JUDGE